

The PEDIGREE.

John, Earl of Peterborow, and Eliz. his Wife.
 Henry, | John, Lord Visc. Mordaunt.
 Lady Mary, | Charles, now Earl
 of Peterborow.

The CASE of Sir John Germaine, Baronet, and the Lady Mary Mordaunt, Baroness Mordaunt of Turvey, Respondents: To the Appeal of the Right Honourable Charles Earl of Peterborow, Appellant.

21 Mar. 19 Jac. 1.

JOHN late Earl of Peterborow, the Respondent's Grandfather, being seized in Fee of the Mannors of Drayton, Ilip, Slifton and Lowick, and of other Lands and Hereditaments in the County of Northampton, did by Indenture, dated 31 Mar. 19. Jac. 1. on his Marriage with Elizabeth Daughter and Heir of William Lord Howard of Effingham, settle the said Premises (being the Estate in question) to the use of himself for Life, to Elizabeth his intended Wife, for Life for her Jointure, Remainder to the Heirs of their two Bodies, with other Remainders over.

24 Nov. 9 Car. 1.

The said Earl John being by such Settlement, Tenant in tail, and having Issue by the said Countess Elizabeth, Henry his Eldest (the Respondent's the Lady Mary's Father) and John his Second Son, (Father of the Appellant.)

13 Nov. 14 Car. 1.

By Indenture, bearing date 14 Nov. 9 Car. 1. made between the said Earl John and Countess Elizabeth his Wife, of the one Part; and the Earl of Bedford and Sir Henry Compton, of the other Part; in consideration that Countess Elizabeth had joined with Earl John in sale of the Mannor of Dunnington, whereof he was seized in her Right, for Payment of the Earl's Debts, and disincumbering his other Estate, and for Performance of Articles, dated the last of May, 8 Car. 1. made between the said Earl John and the Earl of Bedford; The said Earl John thereby covenanted to stand seized (inter alia) of the said Mannors, Lands and Premises to the Use of Countess Elizabeth for Life, Remainder to Earl John for Life; Remainder to Henry their Eldest Son and Heir Apparent in Tail Male; Remainder to his other Sons in Tail Male, with Remainders over.

And for as much as no Fine was levied by Earl John for barring of the Entail, created by the Settlement 19 Jac. 1.

Afterwards, viz. by Indenture 1 Nov. 14 Car. 1. made between the said Earl John and Countess Elizabeth, of the one Part; and the said Earl of Bedford and Sir Henry Compton, of the other Part; reciting the last above-mentioned Indenture, 9 Car. 1. and that no Fine had then been levied of the Premises in question for docking the Entail, altho' Earl John had agreed to do so: And reciting altho' that he was to have Power to sell the Mannors of Ringstead and Addington, which were Part of his Countess's Jointure, the said Earl John and Countess Elizabeth thereby covenanted before the 20th Day of Feb. then next ensuing, to levy a Fine of the Northamptonshire Estate, being the Premises in question, to the Use of Countess Elizabeth for Life, Remainder to Earl John for Life, Remainder to Henry their Eldest Son in Tail Male, Remainder to John their Second Son in Tail Male, with Remainders over.

With a Power in each of the aforementioned Settlements for himself and the said Countess Elizabeth, to grant Leases for 21 Years, or 3 Lives, reserving two Parts in three of the full improv'd Rent. And in Hillary Term next after the Date of the last mentioned Settlement, a Fine was duly levied according to the Covenant therein contain'd.

And the Premises being thus absolutely settled, without any Power of Revocation; it afterwards happened, that Countess Elizabeth having conceived some Displeasure against Henry her Eldest Son, it was attempted to change the Estate Tail vested in him by the two last Deeds into an Estate for Life only, and for that Purpose a Subsequent Settlement was contrived, and accordingly

4 July, 15 Car. 1.

By Indentures of Lease and Release, bearing date 3 & 4 July, 15 Car. 1. to which Earl Henry was no Party, but then an Infant; Earl John and Elizabeth his Countess, in consideration that Countess Elizabeth had therefore join'd with E. John in the Sale of Dunnington, (which in truth (inter alia) was the Consideration of the former Settlement of 9 Car. 1.) and for other the Considerations therein mentioned, limit the Premises in question to the Use of Countess Elizabeth for Life for her Jointure, Remainder to Earl John for Life, Remainder to Henry their Eldest Son for Life, and to his first and other Sons in Tail Male; with the like Remainder to John their second Son for Life, and his first and other Sons in Tail Male, with other Remainders over. And with a like Power of making Leases as in the former Settlements. And with a Power of Revocation.

19 Jan. 1643. Earl John died.

Earl John, 19 Jan. 1643. died, leaving only two Sons, Henry late Earl of Peterborow, then an Infant, the Respondent's the Lady Mary's Father, and John Lord Mordaunt, the Appellant's Father.

Countess Elizabeth surviv'd Earl John, and during the Infancy of Earl Henry, possessed her self of the Writings and Settlements of the Family, and for about 28 Years concealed the Settlements of 9 & 14 Car. 1. from Earl Henry: But upon Search amongst the Records of the Exchequer, it being accidentally discovered, that the Settlement 9 Car. 1. had been formerly pleaded there, and Earl Henry having been informed that the pretended Settlement 16 Car. 1. was not the Real and True Settlement of the Family, but that one or more Prior Settlements had been made (inter alia) of the Premises in question, to other Uses than what are mentioned in the Settlement 16 Car. 1.

Thereupon exhibited his Bill in Chancery against the said Countess Elizabeth, Lord Mordaunt, the Appellant, and others, to discover what Settlements had been made by his Father.

Countess Elizabeth in her Answer to the said Bill confessed she had the Deed of the 14 Car. 1. and after produced it; and by the Proofs in that Cause, it appears the Deed of 9 Car. 1. was burnt.

The said Settlements being thus discovered, and the said Countess Elizabeth having by all the said Settlements such Power of Leasing, as aforesaid; and Earl Henry being willing to come to an Agreement with her touching the time, the better to enable him to manage his Estate to the best Advantage, and to dispose thereof as his Occasions should require.

15 Feb. 1667.

By Articles bearing date the 15th of Feb. 1667. made between the said Countess Elizabeth, of the one Part, and Earl Henry of the other Part, it was agreed, that the Countess should raise by and out of the settled Estate 2000 l. to be equally divided between them; and the Countess did thereby agree, that she would not after such 2000 l. raised, let to farm any Part of the Premises in question, during the Life of the said Earl, without his Consent. And Earl Henry thereby agreed to pay the Countess 60 l. per An. during her Life, from the time he should receive the 2000 l. Part of the 2000 l. to be raised as aforesaid; and the said Countess Elizabeth was enjoined by Decree of the Court of Chancery, on a Bill brought by Earl Henry against her, and the Appellant and others, from making any further Leases.

That the 2000 l. was accordingly raised, and divided between them, and Earl Henry duly paid the 60 l. per An. to Countess Elizabeth, during her Life: Notwithstanding which Agreement and Decree, within 3 or 4 Days after the said Decree and few Days before her decease, by Procurement of the Agents or Friends of John late Lord Mordaunt, the Appellant's Father, taking the Advantage of her Illness, and the Absence of Earl Henry, they prevailed on her to make Leases of some Part of the Premises in question to Andrew Newport, Esq;

3 Mar. 72.

Whereupon the said Earl Henry soon after the Death of the Countess, exhibited his Bill of Revivour against the said John late Lord Mordaunt, the Appellant, and the Executors of the said Countess to have a Discovery thereof, and that such Leases so unduly obtained in Breach of the Agreement which had been in all Things on his Part performed, might be set aside, and proceeded therein and obtained an Order or Decree, That such Leases being ill made, and in Breach of the said Agreement, should be set aside, and by a subsequent Order they were to be sealed up, and left in the Custody of the Usher of the Court of Chancery, there to remain.

That Countess Elizabeth dying in Nov. 1671. Earl Henry, in order to the suffering of a Common Recovery by Indenture, 6 Jan. 25 Car. 2. duly executed by Livery and Seisin, conveyed the Premises to Matthew Johnson and Robert Guy, and their Heirs, to make them Tenants to the Precipe of (inter alia) the Premises in question.

And in Hill. Term then next ensuing a common Recovery, with double Voucher was duly suffered, and the Uses thereof by Indenture, 7 Jan. 25 Car. 2. declared to be to confirm several Mortgage Terms made by Earl Henry to Sir John Duncomb, the Lord Anglesea, and others, for great Sums of Money, and afterwards to Earl Henry and his Heirs, who acted in all things as absolute Owner of the Estate, as in truth he was, and levied other Fines and made other Feoffments of the Northamptonshire Estate, being the Premises in question.

The said E. Henry the Resp^t the Lady Mary's Father being so seized of the Premises in question, and having Issue, the Resp^t the Lady Mary his only Child; and having only an Estate for his Life in the Mannor of Blechingley, in the County of Surrey, the Inheritance and Reversion whereof expectant on his Decese belong'd to the Respondent, desiring the same might be sold to clear the Incumbrance on his Northamptonshire Estate, and that the same should be settled on this Resp^t the Lady Mary (except Drayton House, and Parks, and the Advowsons of Slifton, Ilip, and Lowick,) in lieu of Blechingley.

29 Car. 2. Act of Parl.

Thereupon in the minority of the Resp^t the Lady Mary in 29 Car. 2. An Act of Parl. passed, whereby Blechingley was vested in Trustees to be sold, and afterwards sold accordingly to Sir Rob. Clayton. And the Northamptonshire Estate (except as before is mentioned to be excepted) was vested in the same Trustees to the use of E. Henry for Life, remainder to the Resp^t the Lady Mary and her Heirs for ever.

And the said Drayton House, and Parks, and Advowsons excepted and referred to Earl Henry.

by the said Act of Parl. were in the Year 1677, on the Resp^t the Lady Mary's Marriage with the late Duke of Norfolk, conveyed and settled by Earl Henry to the use of himself for Life, then to Trustees for a 1000 Years for the raising of 10000 l. in part of the said Respondent's Marriage Portion, Remainder to the Duke for Life, Remainder to the said Resp^t for Life, Remainder to their Issue, with a remainder to the late Duke and his Heirs for ever. By and under which Settlement; and by virtue of subsequent Conveyances made by the late Duke, the Lady Mary the Resp^t is become intitled not only to an Estate for Life, but to the Inheritance so limited to the said late Duke, now vested in the Lord Lempster, and Sir John Mordaunt and their Heirs in Trust for the said Resp^t.

The said Resp^t being thus intitled to the Northamptonshire Estate, being the Premises in question, and not above a 6th part of the Estate of her Ancestors to whom she is sole Heir, and the residue thereof enjoy'd by the Appellant, and good part thereof by the Favour of Earl Henry by Conveyances obtained from him for little or no consideration in disherison of this Respondent the Lady Mary; yet the Appellant not being content therewith,

In Hill. Term 1697 brought his Bill in Chancery against the said Respondent, and others, thereby endeavouring to set up the Settlement of 16 Car. 1. taking notice of the Leases made by Countess Elizabeth to Mr. Newport, in breach of her Agreement, and contrary to the Decree aforesaid.

Unto which Bill the said Resp^t by Plea and Answer insisted on her Title to the effect above-mentioned, and that Andrew Newport neither accepted of the said Leases, nor made any Entry or Claim for or in respect thereof, and that the said Leases were made and obtained as aforesaid.

After Issue join'd, divers Witnesses examin'd, and other Proceedings had, the Cause on the 16th Day of December last was heard by the Right Honourable the Lord Keeper, who upon a long and deliberate Hearing, allowed the Respondent's Plea, and dismissed the Appellant's Bill as to the Estate in question, the Appellant not being intitled to any Relief in Equity against the Respondent, he having a plain Remedy at Law by Ejectment if he have a Title; and having brought his Ejectment, on which Issue was long since join'd.

From which Dismissal the said E. of Peterborow hath appeal'd, and assigns for cause and complains, That he was not admitted to read Depositions taken in a former Cause, wherein John Lord Mordaunt was Plaintiff against Earl Henry Defendant, and that yet the Respondent was admitted to read Depositions in a former Cause, wherein Earl Henry was Plaintiff against the said Lord Mordaunt, and others, Defendants, being as alleged cross Causes, and altho' there was an Order made in this Cause by consent, that either Party might use the Depositions in the said former Causes.

Neither the Appellant nor Respondent being Parties to that Suit which was brought by the Appellant's Father, who of the Appellant's own shewing was only Tenant for Life, and therefore the Depositions taken in that Cause by the constant Rule of Evidence, could neither be used for or against the Appellant, but in the other case the Appellant himself was Party, and therefore bound by the Depositions taken in it.

And as to the Order alledg'd to be made by consent, the same extends only for Liberty to make use of them as by Law they might, and not to prevent either side to object that such Depositions were not legal Evidence. It being expressly provided by the very same Order, that all just Exceptions should be sav'd to either Party.

The Appellant complains, that he was not assisted with the Leases made by Countess Elizabeth to Mr. Newport, nor permitted to give Copies thereof in Evidence.

There was no reason that a Court of Equity should permit Leases to be given in Evidence, that were made by Countess Elizabeth against Conscience, and in Breach of an express Agreement to the contrary under Hand and Seal, confirm'd also by Decree obtain'd against the Countess in her Life time.

And also by a subsequent Order or Decree against John Lord Mordaunt the Appellant's Father, and the Appellant himself, and the Executors of the Countess, which said Orders and Decrees remain still in force.

And were such Decrees unjust, as they are not, the same could not be altered by any Original Bill, especially when the Persons interested in such Leases were no Parties to the Suit, nor before the Court. Nor would such Leases avail the Appellant, who pretends to use the same to make the Common Recovery void, since the Feoffment by Earl Henry in 1673 made a good Tenant to the Precipe notwithstanding such Leases. Nor did Mr. Newport ever accept of such Leases, or make any Entry or Claim by virtue thereof; and such Leases are also barred by the Statute of Limitations, and by subsequent Fines.

That the Appellant was not permitted to give in Evidence an Abstract of a Deed surmised to be made by Earl Henry to, or in Trust for one Cox.

Whereas it appears not by any Proof in the Cause, that any such Deed was really executed; or if any such Deed there be, that it in any ways concerns the Respondents, or the Premises in question. Nor is it so much as pretended that such Deed was ever in the Respondent's Custody or Power. And therefore any Abstract thereof ought not to be admitted, much less only a Copy of an Abstract, which was all that was offered in Evidence on the Appellant's part.

That the Settlement 14 Car. 1. was voluntary, and long kept dormant and conceal'd, and afterwards by undue Practice brought to light, and ought to be set aside as against the Settlement 16 Car. 1. made (as alledg'd) on valuable Consideration.

Whereas it fully appears in the Cause that the Settlement 14 Car. 1. was not secreted by Earl Henry, but during the Infancy of Earl Henry fraudulently conceal'd by Countess Elizabeth, on purpose to wrong and injure Earl Henry, and to give Colour to the Appellant's Title under the subsequent Settlement 16 Car. 1.

And was brought to Light as is aforesaid, by a Bill brought by Earl Henry against Countess Elizabeth and others, to discover the Settlements which she endeavoured to suppress.

And surely is neither an undue Practice for a Plaintiff to bring a Bill in Equity to discover Settlements unjustly conceal'd; nor for a Defendant when compell'd to answer such Bill to confess the Truth thereof.

And it seems to be very strangely infer'd, that the Settlement having been fraudulently conceal'd by Countess Elizabeth in prejudice to Earl Henry, that he or any claiming under him should therefore lose the Benefit of it when discovered and retrieved.

Or that it should be made use of as an Argument for setting aside the former, and setting up the subsequent Settlement obtain'd two Years after by the same Countess Elizabeth, who conceal'd the former Settlement, and was a Party to both. And considering also that from the time Earl Henry discovered the said former Settlement, he always avow'd his Title under it, and levied Fines, made Feoffments, suffered a Recovery, made Mortgages, and acted in all things as absolute Owner of the Estate in question.

And it is hoped the Settlement of the 14 Car. 1. ought in all respects to take place against the Settlement 16 Car. 1. being a Settlement by Deed and Fine.

Absolute without any power of Revocation.

And not only prior in time, but also made upon good and valuable Consideration, as (besides other things) the Sale of Ringstead and Addington, and other Lands therein mentioned.

Whereas the Settlement 16 Car. 1. is not only with a Power of Revocation, but colour'd with feign'd Considerations, and amongst others, that Countess Elizabeth had theretofore join'd in the Sale of her Estate in Dunnington, which in truth she had done long before any thoughts were had of the Settlement 16 Car. 1. the same being really amongst other things the Consideration of the Settlement of the 9 Car. 1. Besides, if the Appellant prevails, the Mortgagees, who are no Parties, may lose their Money, which would be a very great Hardship.

Wherefore, and in as much as the Resp^t the Lady Mary is not only Heir at Law to E. Henry her Father, and to E. John her Grandfather; and also is entituled to the Premises in question, under the said several Deeds, Fines, Feoffment, Common Recoveries, but as a Purchaser is also entituled under the said Act of Parliament, and her Marriage Settlement; and for as much as the Appellant may have his Remedy at Law, if any Title he hath, therefore the Respondents humbly insist, that the Dismissal of the Bill was very just, and hope the Appeal shall be also dismissed with costs.

T. Powys.
 Nic. Hooper.
 Tho. Vernon.

1577. Marriage-Settlement.

Hill. Term, 1697. Bill.

Plea and Answer.

Obj. 1.

Resp.

Obj. 2.

Resp.

Obj. 3.

Resp.

Obj. 4.

Resp.